IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1129

SUSAN COHEN, *Petitioner*

v.

CHESTERFIELD COUNTY SCHOOL BOARD AND DR. ROBERT F. KELLY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PHILIP J. HIRSCHKOP
DAVID ROSS ROSENFELD
110 North Royal Street
P.O. Box 234
Alexandria, Virginia 22313
(703) 836-5555

JOHN B. MANN
6801 Park Avenue
Richmond, Virginia 23226
Counsel for Appellee

February 15, 1973

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No.

SUSAN COHEN, *Petitioner*

v.

CHESTERFIELD COUNTY SCHOOL BOARD AND DR. ROBERT F. KELLY, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Susan Cohen, by her attorneys, Philip J. Hirschkop, David Ross Rosenfeld and John B. Mann, respectfully pray for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit to reverse its decision *en banc* reversing the judgment of the Unitd States District Court for the Eastern District of Virginia, Alexandria Division.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, sitting *en banc*, is still unreported but appears at page 14a of the Appendix. The opinion of the United States Court of Appeals

for the Fourth Circuit initially affirming the judgment of the United States District Court for the Eastern District of Virginia, Richmond Division, is still unreported but appears at page 1a of the Appendix. The decision of the United States District Court for the Eastern District of Virginia, Alexandria Division is reported at 326 F. Supp. 1159 (E.D.Va. 1971).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on September 14, 1972. On September 20, 1972 respondents filed their Petition for Rehearing and Suggestion for rehearing *en banc*, which Petition and Suggestion was accepted on January 2, 1973. The judgment of the United States Court of Appeals for the Fourth Circuit, *en banc*, was entered on January 15, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, Sec. 1

". . ., nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS FOR REVIEW

Does a policy which requires female teachers to resign after the fifth month of pregnancy constitute an arbitrary and invidious sex classification in violation of the due process and equal protection clauses of the Fourteenth Amendment?

Did the United States Court of Appeals for the Fourth Circuit commit error in granting respondents' Petition and Suggestion for Rehearing *en banc* and in rendering judgment without requesting or permitting petitioner the right to submit briefs and present argument on her behalf?

STATEMENT OF THE CASE

Petitioner, Susan Cohen, was employed by the School Board of Chesterfield County, Virginia, as a Senior Government teacher from September 1968 to December 1970, under standard employment contracts. On or about November 2, 1970, Mrs. Cohen informed the School Board that she was pregnant and her estimated due date was April 28, 1971.[1] She requested that she be given maternity leave effective April 1, 1971 and presented a letter from her gynecologist stating that she could continue working as long as she chose. Pursuant to the School Board's maternity leave regulations, Mrs. Cohen was informed by school authorities on November 6, 1970, that her request had been denied by the School Board and her employment would be terminated as of December 18, 1970.

On November 25, 1970, petitioner personally appeared before the School Board to request that she be allowed to teach until April 1, 1971, or at least until the end of the first semester on January 21, 1971. She presented a letter from her principal Mr. John R. Kopko recommending that she be allowed to teach until January 21, 1971. The basis of denial was that it was impossible to make a policy to suit everyone, and if the present policy is not adequate the school board would review it at the end of the school year.

---

[1] On May 2, 1971, Mrs. Cohen gave birth to a son.

Upon deposition, the five members of the School Board assigned varied reasons for the existence of a maternity leave policy incorporating a five month rule. Three members of the Board and the Superintendent believed that the rate of absenteeism of a teacher increases in the last four months of pregnancy. The Superintendent and three members felt that it would be dangerous for a pregnant woman to walk down school halls and climb steps. Three members of the School Board felt that it was not good for the students to see women whose pregnancy becomes conspicuous to others, including one member who stated, "because some of the kids say, my teacher swallowed a watermelon, things like that. That is not good for the school system."

At trial and for the very first time during this litigation Dr. Kelly, the Superintendent, suggested that the main reason for the maternity leave regulation is to foster "continuity of teaching" by giving the School Board advance notice to secure replacement teachers. He maintained that the students suffer when there is an interruption of the teaching process between the continuity of the teaching from one teacher to a substitute teacher. He admitted, however, that this argument occurred to him "primarily because of this litigation as distinguished from the reason for the policy." The District Court found as a matter of fact that "no tenable administrative reason [had] been advanced by the defendants in defense of the provision."

Expert medical testimony at trial showed that pregnancy does not incapacitate a school teacher after the fifth month and that there are no valid medical reasons to support these policies. Pregnant women have the same range of coordination as any other group of

people. A pregnant woman could react as well as a nonpregnant woman in an emergency situation. The threat of pushing in halls would present no special problems for pregnant women. Additionally Public Health studies demonstrate that women miss less time from work for delivery and possible disorders of pregnancy, than from such conditions as upper respiratory ailments and injuries.

REASON FOR GRANTING THE WRIT

The fundamental question in this case is the constitutionality of a policy requiring pregnant teachers to take maternity leave five months prior to the birth of the child. In deciding this question in the affirmative, the Court of Appeals for the Fourth Circuit stands alone in the face of overwhelming authority to the contrary. This arbitrary and discriminatory policy has worked a hardship on petitioner solely because of her geographic location. Action by this Court is necessary to bring the Fourth Circuit into conformity with other jurisdictions.

I. A POLICY WHICH REQUIRES FEMALE TEACHERS TO RESIGN AFTER THE FIFTH MONTH OF PREGNANCY CONSTITUTES AN ARBITRARY AND INVIDIOUS SEX CLASSIFICATION IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

In virtually every case testing the constitutionality of a policy requiring pregnant teachers to take maternity leave two to six months prior to delivery, school boards and administrators have sought to rationalize the policy on the grounds that it was reasonably related or necessary to a) protection of the health and safety of the expectant mother and fetus; b) administrative convenience; and c) assuring students con-

tinuity of education. Upon examination, however, it is clear that not one of these rationalizations is either legally or factually sound.

A. Protection of the Mother and Fetus.

In the case at bar, the District Court, after a full trial on the merits, held that "The unrefuted medical evidence is that there is no medical reason for the Board's regulation." *Cohen, supra,* 326 F.Supp. at 1160. Similar conclusions were reached in *Williams* v. *San Francisco Unified School District,* 340 F.Supp. 438, 443 (N.D.Cal. 1972) ("it is undisputed that the plaintiff is medically able to work efficiently until the date of her delivery . . . ."); *Bravo* v. *Board of Education,* 345 F.Supp. 155, 157 (N.D.Ill. 1972); *LaFleur* v. *Cleveland Board of Education,* 465 F.2d 1184 (6th Cir. 1972) *petition for cert. filed,* 41 U.S.L.W. 3315 (U.S. Nov. 27, 1972) (No. 72-777), ("Under no construction of this record can we conclude that the medical evidence presented supports the extended periods of mandatory leave required. . . ."); *Green* v. *Waterford Board of Education,* Docket No. 72-1676 (2nd Cir., decided Jan. 23, 1973) ("We see little rationality in a rule that purports for reasons of health alone to treat all pregnancies alike rather than on case by case basis."). See also *Pocklington* v. *Duval County School Board,* 345 F.Supp. 163 (M.D.Fla. 1972).

Not even the Fourth Circuit in the instant case suggests that a rational basis for the rule can be derived from this "health and safety" argument.

B. Administrative Convenience

In overruling the District Court, the Fourth Circuit, *en banc,* implied that "administrative convenience", on

the other hand, was an acceptable rationale for requiring pregnant teachers to take maternity leave.

> Unlike most illnesses and other disabilities, too, pregnancy permits one to foresee its culmination . . . and to prepare for it.
>
> . . . As planning precedes most pregnancies, planning for the arrangements they necessitate may go hand in hand with them.
>
> *That circumstance supplies the justification for the rule that puts the starting of maternity leave, after the fifth month of pregnancy, within the control of school officials rather than in that of each pregnant teacher* (footnote omitted). *Cohen, supra,* Appx. 21a (emphasis added).

However, as the District Court found, and as Judge Winter, writing first for the majority, and then for the dissent, observed,

> The record is literally devoid of any reason, medical or *administrative,* why a pregnant teacher must accept an enforced leave by the end of the fifth month of pregnancy if she and her doctor conclude that she can perform her duties beyond that date. *Cohen, supra,* Appx. 6a; 25a-26a (emphasis added).

This observation is identical to the one made by the Second Circuit: "Apart from the speculation of the District Court, however, there is nothing in the record to support this proposition." *Green, supra,* at 1735. See also *Bravo, supra,* and *LaFleur, supra.* See also *Williams, supra,* wherein the Court held:

> "It is not sufficient to uphold a practice otherwise violative of the standards governing the equal protection clause to say that the alternative to the classification challenged would create a situation

> which might require more work on the part of the administering agency." 340 F.Supp. at 445.

In this regard, this Court has consistently rejected theories of statutory interpretation or construction which permit "administrative convenience" to override consideration of individual abilities. *Carrington* v. *Rash*, 380 U.S. 89 (1965); *Stanley* v. *Illinois*, 405 U.S. 645, 656 (1972); *Reed* v. *Reed*, 404 U.S. 71 (1971). State as succinctly as possible,

> While it might be easier for the Board to handle all maternity leave problems on an arbitrary, blanket basis, a reduced administrative work load is constitutionally insufficient to sustain this discriminatory treatment of pregnant women. *Green*, *supra* at 1735.

C. Continuity of Education

The "continuity of education" argument was first raised and accepted in *LaFleur* v. *Cleveland Board of Education*, 326 F.Supp. 1208 (N.D. Ohio 1971). On appeal, however, the Sixth Circuit distinguished on the facts the one Circuit Court decision upholding such a policy [2] and implicitly rejected the "continuity of education" argument, holding the mandatory leave policy "arbitrary and unreasonable".

In *Williams, supra,* the Court, again, distinguishing *Schattman, supra,* on the facts, observed that the most significant interruption to the "continuity of education" would result not from the absence, but rather, the enforcement of such a maternity leave policy.

> "All school children under the aegis of the District are entitled to the greatest possible degree of con-

[2] *Schattman* v. *Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), *cert. denied*, 41 U.S.L.W. 3372 (U.S. Jan. 8, 1973).

> tinuity in their educational programs. This desideratum is indisputably frustrated when, for example, a female teacher, otherwise qualified and capable of performing her duties, is hoicked out of the classroom for at least a third of the effective teaching year because she has become pregnant. 340 F.Supp. at 446.

Similarly, in *Bravo, supra,* the evidence clearly demonstrated that ". . . the rigid timetable for maternity leaves now in effect actually contributes to discontinuity . . . ." 345 F.Supp. at 155. See also *Green, supra* at 1733.

The record in this case is absolutely devoid of evidence supporting the rationalization that the absence of a pregnant teacher either prior to or at the time of child birth, will in fact be "extended" (in fact, the evidence is quite to the contrary). The record is equally silent and unsupporting for the assertion that school children will necessarily be victimized by a "succession of substitutes." In fact, testimony at trial demonstrated that the primary concerns of members of the School Board and administration related to increased absenteeism, the ability of pregnant teachers to walk down halls and climb steps, the conspicuousness of the condition of pregnancy, and the fact that "some of the kids say, my teacher swallowed a watermelon. . . ." Nevertheless, the Fourth Circuit, *en banc,* concludes from these spurious and traditionally chauvinistic presumptions, that a mandatory policy of maternity leave "may reasonably be regarded as contributing to the better education of the pupils by enabling school officials to arrange a larger degree of conformity in their education." (footnote omitted). *Cohen, supra,* Appx. 22a.

The record shows that respondents' "continuity of education" argument was developed without a basis in fact and solely for the purpose of providing an *ex post facto* justification for the rule. Clearly it is far more logical to conclude, as did Judge Winter, dissenting, that "The continuity of the educational process would have been better preserved had Mrs. Cohen been permitted to complete the semester rather than to subject her students to a new teacher at an illogical and avoidable breaking point in the curriculum." *Cohen, supra,* Appx. 24a-25a.

D. Denial of Equal Protection

When a rule or regulation is attacked on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment, one of two tests or theories of analysis may be applied to resolve the question. Applying the first of these two tests, the rule is presumed constitutional and will not be disturbed unless it is determined to be without rational basis or based upon grounds wholly irrelevant to the achievement of some permissible state purpose. *Morey* v. *Doud,* 354 U.S. 457 (1957); *McGowan* v. *Maryland,* 366 U.S. 420 (1961). However, under the second approach, where the offending discriminatory regulation impinges upon fundamental constitutional or civil rights, the Court must ask not only whether the classification challenged is rationally related to a legitimate governmental objective, but, more importantly, whether the rule and classification is justified by some "compelling governmental interest." *Shapiro* v. *Thompson,* 394 U.S. 618, 643 (1969).

A regulation designed to restrict the employment rights of pregnant teachers only be viewed as a regulation which restricts the employment rights of wom-

en as a sex and hence is one necessarily based solely upon sex. As stated by Judge Wisdom, dissenting in *Schattman* v. *Texas Employment Commission, supra,* "Female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex . . . ." 459 F.2d at 42. Chief Judge Brown, dissenting in *Phillips* v. *Martin-Marietta Corporation,* 416 F.2d 1257, 1259 (5th Cir. 1969), a case in which an employee who was willing to hire men with pre-school age children for certain positions, but not women, held a similar view: "Nobody—and this includes Judges, Solominic or life tenured—has yet seen a male mother. A mother, to over simplify the simplest biology, must be a woman."

The view that any rule designed to discriminate against pregnant women was in fact a rule discriminatory on the basis of sex, was similarly adopted by the Sixth Circuit in *LaFleur, supra,* wherein the Court held that such a rule "is inherently based upon a classification by sex." 465 F.2d at ——.

To hold, as did the Fourth Circuit, *en banc*, that a regulation discriminating against pregnant teachers "does not apply to women in an area in which they compete with men" and that it is not an "invidious discrimination" to require pregnant teachers to take leaves of absence according to some arbitrary schedule is to "pretend not to know as judges what we know as men." *Johnson* v. *Branch*, 364 F.2d 7, 182 (4th Cir. 1966). It is both unnecessary and obfuscating to transgress into the area of social morality and the logic of permitting the exposure of flat and hairy male chests while prohibiting bare breasts in the sunlight, as was done by Chief Judge Haynsworth, writing for the

majority in *Cohen* (see Appx. 18a). A regulation discriminating against the condition must necessarily discriminate against the only sex capable of experiencing that condition—women. Hence, the more stringent "compelling governmental interest" test should be applied. See *LaFleur, supra; Monell* v. *Department of Social Services*, 4 E.P.D. 5936 (S.D.N.Y. 1972)

Yet, even if the Court prefers to apply the "rational basis" test, the rule and its classification must nevertheless fail. As stated by this Court in *Reed* v. *Reed*, 404 U.S. 71, 76 (1971):

> "A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation. . . .' *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920). The question presented by this case, then, is whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced. . . . See also *Weber* v. *Casualty and Surety Co.*, 406 U.S. 164 (1972); *Police Department* v. *Mosley*, 408 U.S. 92 (1972).

The evidence in the instant case, just as the evidence in *Williams, supra; Bravo, supra; LaFleur, supra; Green, supra; Pocklington, supra;* and *Monell, supra* completely fails to disclose any "fair and substantial relation" between the interest of the legislation and the classification. In each case, theories asserting the interest in the health and safety of the teacher or fetus, the interests of the students in "continuity of education", the interests of the administration in "convenience", have time and again been shown to be arbitrary, capricious, unrelated to or ineffective in achieving the object of the rule.

The mandatory leave policy for pregnant teachers was born out of prejudice and ignorance. In a very few instances it has been sustained as a matter of convenience. It must be viewed for what it truly is, an anachronism and nothing more.

II. THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, EN BANC, VIOLATED PETITIONER'S CONSTITUTIONALLY GUARANTEED RIGHT TO DUE PROCESS.

Rule 35 of the Federal Rules of Appellate Procedure suggests that an *en banc* rehearing by a Court of Appeals will be ordered where it is (1) "necessary to secure or maintain uniformity in decisions, or (2) when the proceeding involves a question of exceptional importance." Since there were no contradictory decisions in this or any other circuit of the United States Court of Appeals, it must be concluded that the Court of Appeals granted rehearing *en banc* in this matter because there were questions of "exceptional importance" involved.

Under Rule 40 of the Federal Rules of Appellate Procedure, petitioner was precluded from filing an answer to the Petition for Rehearing without a specific request to do so by the Court of Appeals. However, Rule 40 further suggests that "a Petition for Rehearing would ordinarily not be granted in the absence of such a request."

The specific application of Rule 40 to the instant case is most significant in light of the sequence of events leading up to the Fourth Circuit Court of Appeals decision on January 2, 1973 to rehear the case *en banc*, and its Order of January 15, 1973 reversing its previous decision. The original appellant brief

was filed more than fourteen months prior to the January 2, 1973 Order granting rehearing *en banc*. Appellate oral argument took place on January 4, 1972, over a year prior to the Court of Appeals Order reversing the lower Court. Additionally, five of the seven judges sitting on the Fourth Circuit bench never had the benefit of any oral argument in this case. Every major federal decision covering the question of pregnant teachers' rights has been rendered within the past twelve months.[3] Nevertheless, petitioner was not granted leave to file additional briefs or present oral argument in this case.

Considering the above circumstances, it is difficult, if not impossible to conceive of a series of procedures more devoid of due process. The Court of Appeals acted solely upon respondants Petition and Suggestion. Counsel for petitioner were not afforded the opportunity to respond. They were not allowed to incorporate recent decisions into the theory of their case or to distinguish contrary decisions. In this system of jurisprudence which extoles the principles of advocacy, petitioner was denied the right to advocate.

In light of the obvious importance and far reaching effect of this case, the actions of the Court of Appeals can only be viewed as having effectively denied petitioner due process of law.

---

[3] See *LaFleur, supra; Green, supra; Monell, supra; Pocklington, supra; Williams, supra; Bravo, supra.* See also Public Law 92-261, 92nd Cong., H.R. 1746 (Equal Employment Opportunity Act of 1972), which amendment extended the coverage of Title VII to employees of state and municipal governments. See Appendix 28a-29a.

CONCLUSION

For these reasons, a Writ of Certiorari should issue and the decision of the Fourth Circuit Court of Appeals should be summarily reversed.

Respectfully submitted,

PHILIP J. HIRSCHKOP
DAVID ROSS ROSENFELD
110 North Royal Street
P.O. Box 234
Alexandria, Virginia 22313
(703) 836-5555

JOHN B. MANN
6801 Park Avenue
Richmond, Virginia 23226

Counsel for Appellee

February 15, 1973

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1707

SUSAN COHEN, *Appellee,*

v.

CHESTERFIELD COUNTY SCHOOL BOARD AND
DR. ROBERT F. KELLY, *Appellants,*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Amicus Curiae.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond.
Robert R. Merhige, Jr., District Judge.

(Argued January 4, 1972 Decided September 14, 1972)

Before HAYNSWORTH, Chief Judge, WINTER, Circuit Judge, and YOUNG, District Judge.

Samuel W. Hixon, III, (Williams, Mullen, and Christian, and Frederick T. Gray, Robert E. Eicher, Oliver D. Rudy and Morris E. Mason on brief) for Appellants, and Philip J. Hirschkop (John B. Mann on brief) for Appellee. (John de J. Pemberton, Jr., Acting General Counsel, Julia P. Cooper, Chief, Appellate Section, Ed Katze, District Attorney, Washington District Office, on brief) for Equal Employment Opportunity Commission.

WINTER, Circuit Judge:

Mrs. Susan Cohen, a school teacher, who, notwithstanding her own wishes and the medical advice of her doctor, was required to take a leave of absence at the end of the fifth month of her pregnancy in accordance with defendant's maternity leave regulation, attacked the validity of the regulation on equal protection grounds in a suit brought under 42 U.S.C.A. § 1983. The district court held that the regulation was within the proscription of the equal protection clause of the fourteenth amendment and granted appropriate relief. Cohen v. Chesterfield County School Board, 326 F.S. 1159 (E.D. Va. 1971). In this appeal by the school board, we affirm.

—I—

The facts are fully set forth in the opinion of the district court and few need be repeated. The text of the regulation is set forth in the margin.[1] Mrs. Cohen gave the prescribed written notice of her pregnancy on November

[1] The maternity leave regulations of the Chesterfield County School Board provide:

a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.

b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extended if the superintendent receives written recommendations from the expectant mother's physican and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

c. Maternity Leave

1. Maternity leave must be requested in writing at the time of termination of employment.

2. Maternity leave will be granted only to those persons who have a record of satisfactory performance.

3. An individual will be declared eligible for re-employment when she submits written notice from her physician that

2, 1970, advising that her estimated date of delivery was April 28, 1971. Initially she requested that she be permitted to continue teaching until April 1, 1971. She supplied a certificate of her doctor that she could continue working as long as she chose. When her request was denied by the school board's personnel, she renewed her request to the board itself, amending it to suggest as an alternative leave date January 21, 1971, at the end of the first semester for the classes she was teaching.[2] This request was also denied and she was granted leave effective December 18, 1970. Suit was subsequently brought.[3]

---

she is physically fit for full-time employment, and when she can give full assurance that care of the child will cause minimal interference with job responsibilities.

4. Re-employment will be guaranteed no later than the first day of the school year following the date that the individual was declared eligible for re-employment.

5. All personnel benefits accrued, including seniority, will be retained during maternity leave unless the person concerned shall have accepted other employment.

6. The school system will have discharged its responsibility under this policy after offering re-employment for the first vacancy that occurs after the individual has been declared eligible for re-employment.

[2] The principal of Mrs. Cohen's school had previously requested that she be permitted to teach until the end of the first semester, January 21, 1971. From the standpoint of minimizing disruption of the education process of her students, this would seem to have been a sensible request. However, blind adherence to the regulation, or the board's convenience in providing a replacement, or possibly the replacement's convenience in beginning work, was permitted to prevail.

[3] In addition to seeking redress of an alleged denial of equal protection the complaint sought relief under the Equal Employment Opportunity Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect

The district court found that there was neither medical reason nor administrative justification for that aspect of the school board's regulation which required that maternity leave begin no later than the end of the fifth month of pregnancy, and that therefore there was no valid basis to treat it differently from leave for other medical disabilities. As a legal consequence, the court concluded, the regulation was discriminatory without rational basis, and thus violative of the equal protection clause.

II

The school board contends that the regulation does not discriminate against woman as such; it only discriminates between pregnant teachers and other teachers. "The fact of pregnancy, rather than sex, is the focus of the regula-

---

to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . .

At the time of the proceedings below, however, state agencies and educational institutions were specifically exempted from the Act. 42 U.S.C. § 2000e(b); 42 U.S.C. § 2000e-1. Subsequent to oral argument, these exemptions were repealed by the Equal Employment Opportunity Act of 1972, P.L. 92-261, signed by the President March 24, 1972 and effective immediately. On April 5, 1972, the Equal Employment Opportunity Commission adopted guidelines (a) declaring that exclusion of employees "from employment . . . because of pregnacy is in *prima facie* violation of Title VII" (29 C.F.R. § 1604.10(a), and (b) requiring employers to treat disabilities caused by pregnancy and childbirth like other temporary disabilities (29 C.F.R. § 1604.10(b)). Rules and practices of the defendant in effect when the defendant was exempt from the Act cannot be the basis for a violation of that Act, even though, as the *amicus* correctly points out, they are entitled to "great deference" in interpreting the Act. Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971).

We will confine ourselves to consideration of the rights and liabilities of the parties under the equal protection clause of the fourteenth amendment. We recognize that, in view of the enactment of the 1972 Act, our decision will have limited precedential value except to sustain the maternity leave and pregnancy guidelines promulgated under that Act against constitutional attack.

tion." (Appellants' Brief p. 5). As to the pregnant school teacher, so the argument runs, the discrimination is permissible because of the need to provide continuity of education in the classroom. Stated otherwise, a uniform date for the beginning of maternity leave is necessary to avoid disruption in the classroom by a sudden and unpredictable need to replace a teacher who delivers prematurely or who suffers a complication of pregnancy necessitating her absence from the classroom.

While superficially appealing, we think this argument lacking in merit and indeed a disingenuous one to be advanced on this record. The record is clear that there is not a high incidence of risk of premature delivery or complications of pregnancy in the beginning of the third trimester of pregnancy—the date that the regulation establishes as the beginning of maternity leave. And on the facts of this case, we can reasonably infer that continuity of the educational process would have been better preserved had Mrs. Cohen been permitted to complete the semester, rather than to subject her students to a new teacher at an illogical and avoidable breaking point in the curriculum.

But there is a more fundamental defect in the school board's argument. That the regulation is a discrimination based on sex, we think is self-evident. The inescapable truth is as Chief Judge Brown of the Fifth Circuit has stated, dissenting from denial of a motion for rehearing in banc in Phillips v. Martin-Marietta Corporation, 416 F.2d 1257, 1259 (5 Cir. 1969), a case in which an employer who was willing to hire men with preschool age children for a certain position but not women was held not to have violated Title VII of the Civil Rights Act of 1964:

> The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges Solo-

> monic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.

Chief Judge Brown's analysis was echoed by Judge Wisdom, also in dissent in Schattman v. Texas Employment Commission, 459 F.2d 32, 42 (5 Cir. 1972), a case asserting the validity of a Texas regulation requiring a pregnant state employee to begin maternity leave not later than two months before her predicted delivery date: "Female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex. . . ."

We need not concern ourselves with the applicable test to discriminate validly on the basis of sex—whether "rational relationship to a state objective," Reed v. Reed, —— U.S. ——, —— (1971); Dandridge v. Williams, 397 U.S. 471, 485 (1970), or a compelling state interest, Shapiro v. Thompson, 394 U.S. 618 (1969)—because under either, we think the regulation denies equal protection. The record is literally devoid of any reason, medical or administrative, why a pregnant teacher must accept an enforced leave by the end of the fifth month of pregnancy if she and her doctor conclude that she can perform her duties beyond that date. Of course her employer is entitled to reasonable notice of when they conclude her leave should begin, so as to enable the employer to provide an adequate substitute, but it would seem that in most instances notice of not more than thirty days would be ample for that purpose. We cannot find in the record, nor can we imagine, any justification for requiring greater certainty as to the effective leave date of a pregnant teacher than of any other teacher, male or female, who may be absent for a prolonged period as a result of illness, emergency surgical procedure, or elective surgical procedure.

Thus, we are in agreement with, and have concluded to follow, the Sixth Circuit's decision in LaFleur v. Cleveland

Board of Education, —— F.2d —— (July 27, 1972) holding invalid, as a denial of equal protection of the laws, a maternity leave regulation which, like that in the case at bar, required a teacher to begin maternity leave not later than five months before the expected date of normal birth of her child, but which, incidentally, required only two weeks notice of the fact of pregnancy and prohibited the teacher's return to her duties earlier than three months after the child's birth. Both the enforced leave before and after birth were held impermissible, because there was lacking, as here, medical evidence or any other valid reason to support the extended period of mandatory leave. While the court recognized that continuity of classroom instruction and relief of burdensome administrative problems would both be served if the regulation were upheld, it concluded that these problems were no more acute with respect to pregnant teachers than other teachers, male or female, who suffered other actual disabilities; and moreover, that administrative convenience could not be permitted to override "the determinative issues of competence and care" (Stanley v. Illinois, —— U.S. ——, —— (April 3, 1972)). Rejected also was the argument that the teacher was bound by her employment contract which required adherence to the regulation because "constitutional protection does extend to the public servant whose exclusion . . . is patently arbitrary or discriminatory." Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

Additional support for our views and those of the Sixth Circuit is found in Robinson v. Rand, —— F.S. —— (D. Colo. 1972); Doe v. Osteopathic Hospital of Wichita, 333 F.S. 1357 (D. Kan. 1971); Williams v. School District, —— F.S. —— (N.D. Cal. 1972); Monell v. Dept. of Social Services, —— F.S. —— (S.D. N.Y. 1972). There is a contrary dictum in the split decision in Schattman v. Texas Employment Commission, supra, indicating that a maternity leave regulation requiring leave to begin not later than two months before the expected delivery date would be

valid; but, without expressing any view on the correctness of the dictum, we agree with the Sixth Circuit in *LaFleur* that *Schattman* is distinguishable from the instant case on its facts.

AFFIRMED

HAYNSWORTH, Chief Judge, dissenting:

If Mrs. Cohen's complaint was of arbitrariness in denying her requested extension of her maternity leave commencement date from December 18 to January 22 and there was proof that a qualified replacement teacher could have been obtained as readily on the latter date as on the former, I would endorse her position. She has undertaken no such showing, however. She stands squarely on a broader constitutional claim which would entirely exclude school officials from participation in the decision on the date of the start of maternity leave. That is for her, alone, to determine, she says, else she is subject to impermissible discrimination based upon sex.

On this record, we cannot deal with some imagined lesser claim. We must accept the larger claim, as the majority does, or reject it as I would.

I think, first, that the regulation is not an invidious discrimination based upon sex. It does not apply to women in an area in which they may compete with men. Secondly, school officials have a duty to provide, as best they can, for continuity in the instruction of children and, to that end, they have a legitimate interest in determining reasonable dates for the commencement of maternity leaves and a right to fix them.

I do not accept Mrs. Cohen's premise that the regulation's provision which denies her, with the advice of her doctor, the right to decide when her maternity leave will begin is an invidious classification based upon sex which may be justified only by some compelling state interest.

Such invidious discriminations are found in situations in which the sexes are in actual or potential competition. A statutory preference for men over women in the appointment of administrators was recently stricken by the Supreme Court as quite unjustified by considerations of administrative convenience.[1]

Only women become pregnant; only women become mothers. But Mrs. Cohen's leap from those physical facts to the conclusion that any regulation of pregnancy and maternity is an invidious classification by sex seems simplistic. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. No man-made law or regulation excludes males from those experiences, and no such laws or regulations can relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood. Pregnancy and motherhood do have a great impact on the lives of women, and, if that impact be reasonably noticed by a governmental regulation, it is not to be condemned as an invidious classification.

We are not accustomed to thinking, as sex classifications, of statutes making it a crime for a man forcefully to ravish a woman or, without force, carnally to know a female child under a certain age. Military regulations requiring all personnel to be clean shaven may be suspect on other grounds, but not because they have no application to females. Prohibition or licensing of prostitution is a patent regulation of sexual activity, the burden of which falls solely on females, but it has not been thought an invidious sex classification. What of regulations requiring adult women sunning themselves on a public beach to keep their breasts covered? Is that an invidious discrimination based upon sex, a denial of equal protection because the flat and hairy chest of a male lawfully may be exposed?

---

[1] Reed v. Reed, 404 U.S. 71.

The situation confronting us is not unlike that which occasioned the memorable lament of Anatole France, "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[2] Concern that the weight of the law falls more heavily upon the poor has been with us for years. Undoubtedly, some laws are directed to offenses which are unlikely to be committed by the wealthy, but there are also crimes which no poor person could commit. If the rich are unlikely to find spaces beneath bridges havens of rest, poor people are unlikely to find an opportunity to embezzle the funds of a national bank[3] or to perpetrate a stock fraud.[4] There are some laws which are not likely to be violated by the rich; there are others which are not likely to be violated by the poor. France stated his lament as he looked at some of such laws from the perspective of the poor, but the law may hold all of us accountable for anti-social conduct despite the differences in the temptations which confront us.

How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot, of course. The disabilities and preoccupations of maternity are visited but slightly upon the father. However sympathetic he may be, it is she who must shoulder the principal problems of pregnancy, the labors of childbirth and the care and feeding of the child in the early months of its life.

Pregnancy and maternity are *sui generis*, and a governmental employer's notice of them is not an invidious classification by sex.

Still, the regulation must serve some reasonable objective. I think it does.

---

[2] A. France, The Red Lily (1894).

[3] 18 U.S.C. §§ 644, 656.

[4] 15 U.S.C. §§ 78n, 78ff.

Here, I may take note of the fact that Mrs. Cohen attempts to confine her attack to the rules under which the time of commencement of maternity leave is determined. There she likens pregnancy to illness and other physical disability contending that failure to treat pregnancy as other disabilities is an unwarranted discrimination.[5]

I think our view should encompass the whole regulation.

There are obvious difficulties in the way of drawing a perfect analogy, as Mrs. Cohen would, between the several conditions contemplated by the maternity leave regulations and physical disabilities.

In the first place, the maternity leave policy of this school system covers an indefinite period of time, after delivery, when the young mother may wish to breast feed her baby or otherwise devote herself primarily to its care. A few weeks after a normal delivery, a healthy young mother is suffering no physical disability. If she chooses to remain on maternity leave for some months thereafter, she does so because of a temporary preference for child-care over a return to teaching and not because of anything remotely resembling illness or physical incapacity.

Even pregnancy is not like illnesses and other disabilities. In this age of wide use of effective contraceptives, pregnancy is usually voluntary. No one wishes to come down with mononucleosis or to break a leg, but a majority of young women do wish to become pregnant, though they seek to select the time for doing so. Female school teachers, like other young women, plan to become pregnant.[6]

---

[5] Her reasoning would seem to invalidate the provision for extended post-delivery leave during which the teacher-mother has a continuing guarantee of reemployment.

[6] Of course, all pregnancies among teachers, as with other women, are not voluntary. *See* Love's Labor Lost: New Conceptions of Maternity Leave, 7 Harv. Civ. Rights—Civ. Liberties L. Rev. 260, 283-84, 288.

Unlike most illnesses and other disabilities, too, pregnancy permits one to foresee its culmination in a period of confinement and to prepare for it. The employer of the pregnant woman need not wait until the clock has struck to search for a replacement. Unexpected illnesses and disabilities may compel resort to a pool of substitute teachers available for short periods of employment, but pregnancy assures an opportunity to secure a more permanent replacement. As planning precedes most pregnancies, planning for the arrangements they necessitate may go hand in hand with them.

That circumstance supplies the justification for the rule that puts the starting of maternity leave, after the fifth month of pregnancy, within the control of school officials rather than in that of each pregnant teacher.

Eighty per cent of the teachers employed in this school system are women. The system is large enough that the Board knows that a certain number of its teachers will become pregnant each year.[7] It knows that many of them will be unable to perform teaching duties over a period of several or many months, while some will be unwilling to do so for several months after the baby's delivery. The pregnant teacher's absence is not only predictable; it is of much longer duration than absences caused by such relatively transitory things as respiratory infections and digestive upsets.

Extended absences of teachers can occasion highly objectionable discontinuity in the education of children. When an extended absence is foreseen, the interest of the children is served by the employment of a regular replacement rather than dependence upon a succession of substitutes. That interest is furthered by the rule which starts the maternity leave at the end of the fifth month of pregnancy with the

[7] In addition to Mrs. Cohen, two others began maternity leave in December, 1970.

provision that the superintendent may postpone the time upon the teacher's request and with the approval of her doctor and her principal.[8] Placing ultimate control in school officials rather than in each individual teacher, affords an opportunity for useful planning and specific commitments to replacement teachers, who, otherwise, might not be available.

Mrs. Cohen, in her contract, agreed to abide by the regulations.[9] Her effort to avoid them insofar as she dislikes them in their application to her should not prevail, for the regulations are not without reason.[10] Their purpose may reasonably be regarded as contributing to the better education of the pupils by enabling school officials to arrange a larger degree of continuity in their instruction.

For these reasons, I respectfully dissent.

---

[8] There is no built-in protection against arbitrary application of the rule in particular cases. If extension were denied when no replacement was available or within weeks of the end of the school year, a different case would be presented. The reasonableness of that extension provision, reasonably applied, moderates the rigidity of the primary rule and deprives it of arbitrariness.

[9] Concurring in Healy v. James, —— U.S. ——, ——, Mr. Justice Rehnquist wrote:

> "Cases such as *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), and *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), make it equally clear that the government in its capacity as employer also differs constitutionally from the government in its capacity as the sovereign executing criminal laws."

[10] *See* McGowan v. Maryland, 366 U.S. 420, 426.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 71-1707

MRS. SUSAN COHEN, *Appellee*,

v.

CHESTERFIELD COUNTY SCHOOL BOARD AND DR. ROBERT F. KELLY, *Appellants*.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Amicus Curiae*.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

Resubmitted January 2, 1973. Decided January 15, 1973.

Before Haynsworth, Chief Judge, Winter, Craven, Butzner, Russell, Field and Widener, Circuit Judges, en banc.

Samuel W. Hixon, III, (Williams, Mullen, and Christian, and Frederick T. Gray, Robert E. Eicher, Oliver D. Rudy and Morris E. Mason on brief) for Appellants, and Philip J. Hirschkop (John B. Mann on brief) for Appellee. (John de J. Pemberton, Jr., Acting General Counsel, Julia P. Cooper, Chief, Appellate Section, Ed Katze, District Attorney, Washington District Office, on brief) for Equal Employment Opportunity Commission.

HAYNSWORTH, Chief Judge:

In this action brought under 42 U.S.C. § 1983, the plaintiff challenges the maternity leave regulation of the Chesterfield County School Board on the ground that it deprives her of her rights to due process and to equal protection of the laws guaranteed under the Fourteenth Amendment to the Constitution.[1] The challenged rule requires, with limited flexibility, that teachers who become pregnant must go on maternity leave at the end of the fifth month of pregnancy.[2] This appeal is taken from the Dis-

---

[1] Mrs. Cohen's complaint sought relief also under the Equal Employment Opportunity Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a):

> "It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; * * *."

At the time of the proceedings below, however, state agencies and educational institutions were specifically exempted from the Act. 42 U.S.C. § 2000e(b); 42 U.S.C. §2000e-1. Subsequent to oral argument, these exemptions were repealed by the Equal Employment Opportunity Act of 1972, P.L. 92-261, signed by the President March 24, 1972 and effective immediately. Rules and practices of the defendant in effect when the defendant was exempt from the Equal Employment Opp. Act cannot be the basis for a violation of that Act. This opinion accordingly is limited to consideration of the rights and liabilities of the parties under the Equal Protection Clause of the Fourteenth Amendment.

[2] The maternity leave provisions of the Chesterfield County School Board provides:

> "a. Notice in writing must be given to the School Board at least six (6) months prior to the date of expected birth.
>
> b. Termination of employment of an expectant mother shall become effective at least four (4) months prior to the expected birth of the child. Termination of employment may be extend-

trict Court's decision that the maternity leave rule deprived Mrs. Cohen of equal protection: "Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment." *Cohen* v. *Chesterfield County School Board*, E.D.Va., 326 F.Supp. 1159, 1161.

When Mrs. Cohen became pregnant she was a social studies teacher at Midlothian High School in Chesterfield County. Her contract with the School Board required her to comply with all state and local school laws and regulations. In compliance with the Board's maternity provi-

---

ed if the superintendent receives written recommendations from the expectant mother's physician and her principal, and if the superintendent feels that an extension will be in the best interest of the pupils and school involved.

e. Maternity Leave

1. Maternity leave must be requested in writing at the time of termination of employment.

2. Maternity leave will be granted only to those persons who have a record of satisfactory performance.

3. An individual will be declared eligible for re-employment when she submits written notice from her physician that she is physically fit for full-time employment, and when she can give full assurance that care of the child will cause minimal interference with job responsibilities.

4. Re-employment will be guaranteed no later than the first day of the school year following the date that the individual was declared eligible for re-employment.

5. All personnel benefits accured, including seniority, will be retained during maternity leave unless the person concerned shall have accepted other employment.

6. The school system will have discharged its responsibility under this policy after offering re-employment for the first vacancy that occure after the individual has been declared eligible for re-employment.

sions, Mrs. Cohen notified the Board on November 2, 1970 that she was pregnant and that her estimated date of delivery was April 28, 1971. With the written opinion of her obstetrician that she could work as long as she chose, she requested an extension until April 1, 1971 of the date she would stop teaching. The School Board denied this request, granting her leave effective December 18, 1970. In a subsequent personal appearance before the Board, Mrs. Cohen made an alternate request of an extension until January 21, 1971—the end of the semester. This request, supported by a recommendation of her principal, was also denied. The District Court found that the basis of the denials of the requested extensions was that "the School Board had a replacement available, and felt it proper to abide by its regulation."

The plaintiff asserts no claim of arbitrariness in the denial of the alternative request of an extension until January 21, 1971. She has made no attempt to show that a qualified replacement would have been as readily available then, or in April, as in December. She stands squarely on a broader constitutional claim which would entirely exclude school officials from participation in the decision on the date of the maternity leave. That is for her, alone, to determine, she says, else she is subject to impermissible discrimination based upon sex.

We conclude, first, that the regulation is not an invidious discrimination based upon sex. It does not apply to women in an area in which they may compete with men. Secondly, school officials have a duty to provide, as best they can, for continuity in the instruction of children and, to that end, they have a legitimate interest in determining reasonable dates for the commencement of maternity leaves and a right to fix them.

We do not accept Mrs. Cohen's premise that the regulation's provision which denies her, with the advice of her doctor, the right to decide when her maternity leave will begin is an invidious classification based upon sex which

may be justified only by some compelling state interest. Such invidious discriminations are found in situations in which the sexes are in actual or potential competition. A statutory preference for men over women in the appointment of administrators was recently striken by the Supreme Court as quite unjustified by considerations of administrative convenience.[3]

Only women become pregnant; only women become mothers. But Mrs. Cohen's leap from those physical facts to the conclusion that any regulation of pregnancy and maternity is an invidious classification by sex is merely simplistic. The fact that only women experience pregnancy and motherhood removes all possibility of competition between the sexes in this area. No man-made law or regulation excludes males from those experiences, and no such laws or regulations can relieve females from all of the burdens which naturally accompany the joys and blessings of motherhood. Pregnancy and motherhood do have a great impact on the lives of women, and, if that impact be reasonably noticed by a governmental regulation, it is not to be condemned as an invidious classification.

We are not accustomed to thinking, as sex classifications, of statutes making it a crime for a man forcefully to ravish a woman, or, without force, carnally to know a female child under a certain age. Military regulations requiring all personnel to be clean shaven may be suspect on other grounds, but not because they have no application to females. Prohibition or licensing of prostitution is a patent regulation of sexual activity, the burden of which falls primarily on females, but it has not been thought an invidious sex classification. What of regulations requiring adult women sunning themselves on a public beach to keep their breasts covered? Is that an invidious discrimination based upon sex, a denial of equal protection because the flat and hairy chest of a male lawfully may be exposed?

---

[3] Reed v. Reed, 404 U.S. 71.

The situation confronting us is not unlike that which occasioned the memorable lament of Anatole France, "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[4] Concern that the weight of the law falls more heavily upon the poor has been with us for years. Undoubtedly, some laws are directed to offenses which are unlikely to be committed by the wealthy, but there are also crimes which no poor person could commit. If the rich are unlikely to find spaces beneath bridges havens of rest, poor people are unlikely to find an opportunity to embezzle the funds of a national bank[5] or to perpetrate a stock fraud.[6] There are some laws which are not likely to be violated by the rich; there are others which are not likely to be violated by the poor. France stated his lament as he looked at some of such laws from the perspective of the poor, but the law may hold all of us accountable for antisocial conduct despite the differences in the temptations which confront us.

How can the state deal with pregnancy and maternity in terms of equality with paternity? It cannot, of course. The disabilities and preoccupations of maternity are visited but slightly upon the father. However sympathetic he may be, it is she who must shoulder the principal problems of pregnancy, the labors of childbirth and the care and feeding of the child in the early months of its life.

Pregnancy and maternity are *sui generis*, and a governmental employer's notice of them is not an invidious classification by sex.

Still, the regulation must serve some reasonable objective. We think it does.

---

[4] A. France, The Red Lily (1894).

[5] 18 U.S.C. §§ 644, 656.

[6] 15 U.S.C. §§ 78n, 78ff.

Here we may take note of the fact that Mrs. Cohen attempts to confine her attack to the rules under which the time of commencement of maternity leave is determined. There she likens pregnancy to illness and other physical disability, contending that failure to treat pregnancy as other disabilities is an unwarranted discrimination.[7]

We thnk our view should encompass the whole regulation.

There are obvious difficulties in the way of drawing a perfect analogy, as Mrs. Cohen would, between the several conditions contemplated by the maternity leave regulations and physical disabilities.

In the first place, the maternity leave policy of this school system covers an indefinite period of time, after delivery, when the young mother may wish to breast feed her baby or otherwise devote herself primarily to its care. A few weeks after a normal delivery, a healthy young mother is suffering no physical disability. If she chooses to remain on maternity leave for some months thereafter, she does so because of a temporary preference for child-care over a return to teaching and not because of anything remotely resembling illness or physical incapacity.

Even pregnancy is not like illnesses and other disabilities. In this age of wide use of effective contraceptives, pregnancy is usually voluntary. No one wishes to come down with mononucleosis or to break a leg, but a majority of young women do wish to become pregnant, though they seek to select the time for doing so. Female school teachers, like other young women, plan to become pregnant.[8]

---

[7] Her reasoning would seem to invalidate the provision for extended post-delivery leave during which the teacher-mother has a continuing guarantee of reemployment.

[8] Of course, all pregnancies among teachers, as with other women, are not voluntary. *See* Love's Labor Lost: New Conceptions of Maternity Leave, 7 Harv. Civ. Rights—Civ. Liberties L. Rev. 260, 283-84, 288.

Unlike most illnesses and other disabilities, too, pregnancy permits one to foresee its culmination in a period of confinement and to prepare for it. The employer of the pregnant woman need not wait until the clock has struck to search for a replacement. Unexpected illnesses and disabilities may compel resort to a pool of substitute teachers available for short periods of employment, but pregnancy assures an opportunity to secure a more permanent replacement. As planning precedes most pregnancies, planning for the arrangements they necessitate may go hand in hand with them.

That circumstance supplies the justification for the rule that puts the starting of maternity leave, after the fifth month of pregnancy, within the control of school officials rather than in that of each pregnant teacher.[9]

Eighty per cent of the teachers employed in this school system are women. The system is large enough that the Board knows that a certain number of its teachers will become pregnant each year.[10] It knows that many of them will be unable to perform teaching duties over a period of several or many months, while some will be unwilling to do so for several months after the baby's delivery. The pregnant teacher's absence is not only predictable; it is of much longer duration than absences caused by such relatively transitory things as respiratory infections and digestive upsets.

Extended absences of teachers can occasion highly objectionable discontinuity in the education of children. When an extended absence is foreseen, the interest of the children is served by the employment of a regular replacement

---

[9] Since we conclude that continuity in instruction reasonably supports the rule we need not consider other personalized reasons advanced in support of the regulation.

[10] In addition to Mrs. Cohen, two others began maternity leave in December, 1970.

rather than dependence upon a succession of substitutes. That interest is furthered by the rule which starts the maternity leave at the end of the fifth month of pregnancy with the provision that the superintendent may postpone the time upon the teacher's request and with the approval of her doctor and her principal.[11] Placing ultimate control in school officials rather than in each individual teacher, affords an opportunity for useful planning and specific commitments to replacement teachers, who, otherwise, might not be available.

Mrs. Cohen, in her contract, agreed to abide by the regulations.[12] Her effort to avoid them insofar as she dislikes them in their application to her should not prevail, for the regulations are not without reason.[13] Their purpose may reasonably be regarded as contributing to the better education of the pupils by enabling school officials to arrange a larger degree of continuity in their instruction.[14]

Reversed.

---

[11] There is no built-in protection against arbitrary application of the rule in particular cases. If extension were denied when no replacement was available or within weeks of the end of the school year, a different case would be presented.

[12] Concurring in Healy v. James, —— U.S. ——, ——, Mr. Justice Rehnquist wrote:

> "Cases such as *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947), and *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), make it equally clear that the government in its capacity as employer also differs constitutionally from the government in its capacity as the sovereign executing criminal laws."

[13] *See*, McGowan v. Maryland, 366 U.S. 420, 426.

[14] The point is being widely litigated with diverse results. *See, e.g.*, Schattman v. Texas Employment Commission, 5 Cir., 459 F.2d 32; LaFleur v. Cleveland Bd. of Educ., N.D.Ohio, 326 F.Supp. 1208; Doe v. Osteopathic Hospital of Wichita, D.Kansas, 333 F. Supp. 1357; Robinson v. Rand, D.Colo., 340 F.Supp. 37; Williams v. School District, N.D.Calif., 340 F.Supp. 438; Monell v. Dept. of Social Services, S.D.N.Y., —— F.Supp. ——; Danielson v. Bd. of

WINTER, Circuit Judge, dissenting:

Because I disagree with the conclusion of the majority and because the majority's decision, if it prevails, may well be relied on to invalidate an aspect of the implementation of the Equal Employment Opportunity Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a),[1] I respectfully dissent.

Educ. of the City Univ. of N.Y., S.D.N.Y., ——F.Supp. ——; Bravo v. Bd. of Educ., N.D.Ill. 345 F.Supp. 155; Cerra v. East Stroudsburg Area School District, Pa. Cmwlth., 285 A.2d 206.

[1] In addition to seeking redress of an alleged denial of equal protection, plaintiff's complaint sought relief under the Equal Employment Opportunity Act, Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2(a):

> It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . . .

At the time of the proceedings below, however, state agencies and educational institutions were specifically exempted from the Act. 42 U.S.C.A. § 2000e(b); 42 U.S.C.A. § 2000e-1. Subsequent to oral argument, these exemptions were repealed by the Equal Employment Opportunity Act of 1972, P.L. 92-261, signed by the President March 24, 1972 and effective immediately. On April 5, 1972, the Equal Employment Opportunity Commission adopted guidelines (a) declaring that exclusion of employees "from employment . . . because of pregnancy is in *prima facie* violation of Title VII" (29 C.F.R. § 1604.10(a), and (b) requiring employers to treat disabilities caused by pregnancy and childbirth like other temporary disabilities (29 C.F.R. § 1604.10(b)).

Although rules and practices of the defendant in effect when the defendant was exempt from the Act cannot be the basis for a violation of that Act, even though, as the *amicus* correctly points out, they are entitled to "great deference" in interpreting the Act, Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971), the majority's holding is to the effect that constitutionally discrimina-

The majority concludes that the regulation does not discriminate against woman as such; it only discriminates between pregnant teachers and other teachers. "It [the regulation] does not apply to women in an area in which they compete with men." As to the pregnant school teacher, so the argument runs, the discrimination is permissible because of the need to provide continuity of education in the classroom.[2] Stated otherwise, a uniform date for the beginning of maternity leave is necessary to avoid disruption in the classroom by a sudden and unpredictable need to replace a teacher who delivers prematurely or who suffers a complication of pregnancy necessitating her absence from the classroom.

While superficially appealing, I am not persuaded by this argument and I think it a disingenuous one to be advanced on this record. The record is clear that there is not a high incidence of risk of premature delivery or complications of pregnancy in the beginning of the third trimester of pregnancy—the date that the regulation establishes as the beginning of maternity leave. And on the facts of this case, one can reasonably infer that continuity of the educational process would have been better preserved had Mrs. Cohen

---

tion between pregnant women and other women and men, on account of pregnancy, is permissible. It would seem to follow that a contrary regulation would be in excess of the statutory grant of authority.

[2] The record belies the benevolent purpose of the school officials ascribed to them by the majority: The principal of Mrs. Cohen's school had previously requested that she be permitted to teach until the end of the first semester, January 21, 1971. From the standpoint of minimizing disruption of the education process of her students, this would seem to have been a sensible request. However, blind adherence to the regulation, or the board's convenience in providing a replacement, or possibly the replacement's convenience in beginning work, was permitted to prevail. The board itself never articulated the reason for rejecting the recommendation of one who could be expected to have more intimate and accurate knowledge of the needs of the pupils affected than it.

been permitted to complete the semester rather than to subject her students to a new teacher at an illogical and avoidable breaking point in the curriculum.

But there is a more fundamental defect in the majority's opinion. That the regulation is a discrimination based on sex, I think is self-evident. The inescapable truth is as Chief Judge Brown of the Fifth Circuit has stated, dissenting from denial of a motion for rehearing in banc in Phillips v. Martin-Marietta Corporation, 416 F.2d 1257, 1259 (5 Cir. 1969), a case in which an employer who was willing to hire men with preschool-age children for a certain position but not women was held not to have violated Title VII of the Civil Rights Act of 1964:

> The distinguishing factor seems to be motherhood versus fatherhood. The question then arises: Is this sex-related? To the simple query the answer is just as simple: Nobody—and this includes Judges, Solomonic or life tenured—has yet seen a male mother. A mother, to oversimplify the simplest biology, must then be a woman.

Chief Judge Brown's analysis was echoed by Judge Wisdom, also in dissent in Schattman v. Texas Employment Commission, 459 F.2d 32, 42 (5 Cir. 1972), a case asserting the validity of a Texas regulation requiring a pregnant state employee to begin maternity leave not later than two months before her predicted delivery date: "Female employees are the only employees . . . who become pregnant; it follows that they are provisionally dismissed from work on account of their sex . . . ."

I need not concern myself with the applicable test to discriminate validly on the basis of sex—whether "rational relationship to a state objective," Reed v. Reed, —— U.S. ——, —— (1971); Dandridge v. Williams, 397 U.S. 471, 485 (1970), or a compelling state interest, Shapiro v. Thompson, 394 U.S. 618 (1969)—because under either, I think the regulation denies equal protection. The record is

literally devoid of any reason, medical or administrative, why a pregnant teacher must accept an enforced leave by the end of the fifth month of pregnancy if she and her doctor conclude that she can perform her duties beyond that date. Of course her employer is entitled to reasonable notice of when the teacher and her doctor conclude her leave should begin, so as to enable the employer to provide an adequate substitute, but it would seem that in most instances notice of not more than thirty days would be ample for that purpose. If I put aside instances where a teacher, male or female, suffers a sudden illness or the need for emergency surgery, and where presumably the teacher has little or no notice of impending prolonged absence, I cannot find in the record, nor can I imagine, any justification for requiring greater certainty as to the effective leave date of a pregnant teacher than of any other teacher, male or female, who may be absent for a prolonged period as a result of elective surgical procedure.

To give an example of my last statement, prostatitis is peculiarly a male disease and in this sense sex related. A prostatectomy which may be required as a result of prostatitis or other chronic disease of the prostate, is rarely performed as an emergency surgical procedure. Rather, within a reasonable time range, the date for a prostatectomy is scheduled for a date suiting the availability of the hospital and the convenience of the surgeon and the patient. Under general sick leave regulations, a male teacher planning to undergo a prostatectomy is not required to give advance notice of the contemplated operation or to begin sick leave at any specific date, even at a semester break if one should intervene, prior to the operation, or to seek permission to continue work until the operation. Least it be thought that an elective prostatectomy among male teachers is a rare event, I stress that the general sick leave requirements contain no requirment of notice, a mandatory beginning of sick leave or continuation of employment after notice until surgery for *any* elective surgery for *any* teach-

er, male or female. Yet it cannot be said that the disruptive effect on the students or the burden on the school administration is any less in the case of any elective surgery than the disruption and burden occasioned by a pregnant teacher's absenting herself to deliver. Indeed, it would be greater since the pregnant teacher would have been required to give notice of her impending confinement and thus school officials would have had ample time in which to find a replacement. To me, the discrimination is obvious.

I agree with the Sixth Circuit's decision in LaFleur v. Cleveland Board of Education, —— F.2d —— (July 27, 1972) holding invalid, as a denial of equal protection of the laws, a maternity leave regulation which, like that in the case at bar, required a teacher to begin maternity leave not later than five months before the expected date of normal birth of her child, but which, incidentally, required only two weeks notice of the fact of pregnancy and prohibited the teacher's return to her duties earlier than three months after the child's birth. Both the enforced leave before and after birth were held impermissible, because there was lacking, as here, medical evidence or any other valid reason to support the extended period of mandatory leave. While the Court recognized that continuity of classroom instruction and relief of burdensome administrative problems would both be served if the regulation were upheld, it concluded that these problems were no more acute with respect to pregnant teachers than other teachers, male or female, who suffered other actual disabilities; and moreover, that administrative convenience could not be permitted to override "the determinative issues of competence and care" (Stanley v. Illinois, —— U.S. ——, —— (April 3, 1972)). Rejected also was the argument that the teacher was bound by her employment contract which required adherence to the regulation because "constitutional protection does extend to the public servant whose exclusion ... is patently arbitrary or discriminatory." Wieman v. Updegraff, 344 U.S. 183, 192 (1952).

Additional support for my views is found in Robinson v. Rand, —— F.S. —— (D. Colo. 1972); Doe v. Osteopathic Hospital of Wichita, 333 F.S. 1357 (D. Kan. 1971); Williams v. School District, —— F.S. —— (N.D. Cal. 1972); Monell v. Dept. of Social Services, —— F.S. —— (S.D. N.Y. 1972); Bravo v. Board of Education, —— F.S. —— (N.D. Ill. 1972); Heath v. Westerville Board of Education, 345 F.S. 501 (S.D. Ohio 1972). There is a contrary dictum in the split decision in Schattman v. Texas Employment Commission, supra, indicating that a maternity leave regulation requiring leave to begin not later than two months before the expected delivery date would be valid; but, without expressing any view on the correctness of the dictum, I agree with the Sixth Circuit in *LaFleur* that *Schattman* is distinguishable from the instant case on its facts.

Judge Craven and Judge Butzner authorize me to say that they join in this opinion.

29 C.F.R. 1604.10 Employment Policies Relating to Pregnancy and Childbirth.

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is in *prima facie* violation of Title VII.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to

pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.